Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1304 OF 2006
ABDUL MALIK ISHAK, AZHAR MA'AH AND SYED AHMAD HELMY JJCA
10 MARCH 2010

Companies and Corporations — Winding up — Appeal against winding up — Money judgment grounding winding up petition not set aside, varied or appealed against by debtor — Whether judgment open to challenge in winding up proceedings against debtor

Companies and Corporations — Winding up — Inability to pay debts — Test for commercial insolvency — Circumstances when just and equitable to wind up company, whether endless

Companies and Corporations — Winding up — Opposition to winding up — Affidavit in opposition filed and served one day before hearing of petition — Whether affidavit ought to be rejected — Companies (Winding-Up) Rules 1972 r 30(1)

The petitioner obtained an order against the respondent and another on 3 June 2005 ('the 3 June order') directing them to jointly and severally repay the petitioner trust money with accrued interest thereon. The petitioner thereafter issued and served a notice under s 218(e) of the Companies Act 1965 ('Act') on the respondent's secretary. The respondent failed to pay the sum within three weeks of the notice prompting the petitioner to file a winding-up petition against the respondent. The respondent also failed at any time to set aside, vary or appeal against the 3 June order. Just one day before the scheduled hearing of the petition, the respondent filed and served an affidavit in opposition ('the respondent's affidavit') to the petition. At the hearing, the petitioner raised an objection to the admissibility of the respondent's affidavit on the basis that it was filed and served less than seven days from the hearing. The High Court upheld the objection and subsequently wound up the respondent. The respondent appealed against the High Court's winding up order.

Held, dismissing the appeal with costs:

(1) The test to ascertain commercial insolvency is whether the company is

unable to meet its current debts as they fall due. Such a company would be categorised as 'unable to pay its debts' even though: (i) it has substantial wealth which cannot be immediately realised; and (ii) on liquidation it would be able to meet all its liabilities (see para 7).

(2) The clear and unambiguous words in r 30(1) of the Companies (Winding-up) Rules 1972 had to be given effect. Thus, the respondent's impugned affidavit in opposition could not be relied upon in opposing the petition (see para 17); *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 (CA) referred; *The Sussex Peerage* (1844) 11 Cl & Fin 85 referred.

(3) The 3 June order was final, conclusive and binding. It was legally impossible for the respondent to challenge the validity of the 3 June order in the winding up proceedings (see paras 19–20); *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 (SC) referred; *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 6 MLJ 155 referred.

(4) In the instant case, the respondent was insolvent. It was unable to repay the money ordered repaid in compliance with the 3 June order. It was thus just and equitable for the respondent to be wound up pursuant to s 218(1)(i) of the Act (see para 22).

(5) What is just and equitable varies from case to case. The circumstances when it is just and equitable to wind up a company are endless (see paras 23–24).

[Bahasa Malaysia summary

Pempetisyen telah memperoleh perintah terhadap responden dan satu lagi pada 3 Jun 2005 ('perintah 3 Jun tersebut') mengarahkan ia secara bersesama dan berasingan membayar semula wang amanah pempetisyen bersama dengan faedah yang terakru. Pempetisyen kemudiannya telah mengeluar dan menyampaikan notis di bawah s 218(e) Akta Syarikat 1965 ('Akta') kepada setiausaha responden. Responden gagal membayar jumlah tersebut dalam masa tiga minggu notis tersebut yang menyebabkan pempetisyen memfailkan petisyen penggulungan terhadap responden. Responden juga gagal pada bila-bila masa untuk mengetepikan, mengubah atau merayu terhadap perintah 3 Jun tersebut. Sehari sebelum perbicaraan yang dijadualkan bagi petisyen tersebut, responden memfail dan menyampaikan afidavit bantahan ('afidavit responden') terhadap petisyen tersebut. Semasa perbicaraan, pempetisyen membuat bantahan terhadap penerimaan afidavit responden atas sebab ia difail dan disampaikan kurang daripada tujuh hari sebelum perbicaraan. Mahkamah Tinggi membenarkan bantahan tersebut dan

selanjutnya menggulung responden. Responden membuat rayuan terhadap perintah penggulungan Mahkamah Tinggi tersebut. A

Diputuskan, menolak rayuan dengan kos:

(1) Ujian untuk menentukan insolvensi komersial adalah sama ada syarikat tersebut gagal membayar hutang-hutangnya pada tarikh yang patut. Syarikat tersebut dikategorikan sebagai 'unable to pay its debts' walaupun: (i) ia mempunyai harta yang banyak yang mana tidak boleh direalisasikan dengan segera; dan (ii) atas penyelesaian, ia boleh membayar kesemua liabilitinya (lihat perenggan 7). B C

(2) Perkataan yang jelas dalam k 30(1) Kaedah-Kaedah Syarikat (Penggulungan) 1972 perlu diberi kesan. Oleh itu, afidavit bantahan responden yang dipersoalkan tidak boleh digunakan dalam membantah petisyen tersebut (lihat perenggan 17); *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 (MR) dirujuk; *The Sussex Peerage* (1844) 11 Cl & Fin 85 dirujuk. D

(3) Perintah 3 Jun tersebut adalah muktamad dan mengikat. Adalah mustahil dari segi undang-undang untuk responden mencabar kesahan perintah 3 Jun dalam prosiding penggulungan tersebut (lihat perenggan 19–20); *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 (MP) dirujuk; *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 6 MLJ 155 dirujuk. E

(4) Dalam kes ini, responden adalah insolven. Ia gagal untuk membayar semula wang yang diperintahkan untuk dibayar menurut perintah 3 Jun tersebut. Oleh itu, adalah adil dan saksama bagi responden untuk digulungkan mengikut s 218(1)(i) Akta (lihat perenggan 22). F

(5) Apa itu adil dan saksama berbeza mengikut kes. Keadaan-keadaan di mana ianya adil dan saksama untuk menggulungkan sebuah syarikat adalah terlalu banyak (lihat perenggan 23–24).] G

Notes

For cases on appeal against winding up, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 982–987. H

For cases on inability to pay debts, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1080–1145.

For cases on opposition to winding up, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1316–1318. I

Cases referred to

A Company, Re [1985] BCLC 37, Ch D (refd)

Baku Consolidated Oilfields Ltd, Re [1944] 1 All ER 24, Ch D (refd)

A *Bleriot Manufacturing Aircraft Company (Limited), In re* (1916) 32 TLR 253 (refd)
Bryant Investment Co Ltd, Re [1974] 2 All ER 683, Ch D (refd)
Chynchen Associates Ltd, Re [1987] 1 HKC 311, HC (refd)
Coolgardie Consolidated Gold Mines Ltd, Re (1897) 76 LT 269 (refd)
B *Cornhill Insurance plc v Improvement Services Ltd and others* [1986] 1 WLR 114, Ch D (refd)
Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd [1997] 2 MLJ 756, CA (refd)
Crown Bank, In re (1890) 44 Ch D 634, Ch D (refd)
C *Davis & Co Ltd v Brunswick (Australia) Ltd; Brunswicke-Balke-Collender Co and Brunswick Radio Corporation* [1936] 1 All ER 299, PC (refd)
Diamond Fuel Company, In re (1879) 13 Ch D 400, CA (refd)
Dynasty Rangers Sdn Bhd & Anor v Perak Meat Industries Sdn Bhd [2002] 5 MLJ 291, HC (refd)
D *Galbraith v Merito Shipping Co Ltd* 1947 SC 446 (refd)
General Phosphate Corporation, In re; Northern Transvaal Gold Mining Company, In re; Delhi Steamship Company, In re [1895] 1 Ch 3, CA (refd)
German Date Coffee Company, In re (1881–82) 20 Ch D 169, CA (refd)
E *Goodwealth Trading Pte Ltd, Re* [1991] 2 MLJ 314, HC (refd)
Great Northern Copper Mining Co of South Australia Ltd, Re; Ex p The Co (1869) 20 LT 347 (refd)
Hadkinson v Hadkinson [1952] P 285, CA (refd)
Haven Gold Mining Company, In re (1881–82) 20 Ch D 151, CA (refd)
F *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21, HC (refd)
Johnson v Walton (1990) 1 FLR 350, CA (refd)
Kitson & Co Ltd, Re [1946] 1 All ER 435, CA (refd)
Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)
G *Lympne Investments Ltd, Re* [1972] 2 All ER 385, Ch D (refd)
Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53, PC (refd)
MBF Finance Bhd v Sri-Hartamas Dvpt Sdn Bhd [1992] 3 CLJ Rep 55, HC (refd)
H *Mediavision Ltd, Re* [1993] 2 HKC 629, HC (refd)
Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd [2000] 6 CLJ 290, HC (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95, SC (refd)
I *Newbridge Sanitary Steam Laundry Ltd, In re The* (1917) 1 IR 67 (refd)
Ng Ah Kway v Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58, HC (refd)
Palace Restaurants, Limited, In re [1914] 1 Ch 492 (refd)
Perfectair Holdings Ltd, Re [1990] BCLC 423, Ch D (refd)

Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd [1998] 3 MLJ 810, HC (refd)
PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd [1995] 1 MLJ 21, HC (refd)
Red Rock Gold Mining Co Ltd, In re (1889) 61 LT 785 (refd)
San Imperial Corp Ltd (No 2), Re [1980] 1 HKC 463, HC (refd)
Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd [1985] 1 MLJ 84, HC (refd)
Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326, HC (refd)
Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304, SC (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313, SC (refd)
Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor, Re v Official Receiver And Liquidator of Mosbert Acceptance Ltd [1978] 1 MLJ 57, CA (refd)
Sussex Peerage, The (1844) 11 Cl & Fin 85, HL (refd)
Tioh Ngee Heng, Re; ex p Yap Kiu Lian @ Norhashimah Yap (administratrix of the estate of Mohamad Shariff bin Haji Hussain) [2000] 6 MLJ 155, HC (refd)
Varieties Limited, In re The [1893] 2 Ch 235, Ch D (refd)
Wei Giap Construction Co (Pte) Ltd v Intraco Ltd [1979] 2 MLJ 4 (refd)
Wey and Arun Junction Canal Company, In re (1867) 4 LR Eq 197 (refd)

Legislation referred to

Companies Act 1965 s 218(1)(e), (i), (2), (2)(a)
Companies (Winding-Up) Rules 1972 r 30(1)

Appeal from: Company Winding Up No D4–28–635 of 2006 (High Court, Kuala Lumpur)

Lee Chan Leong (Chan Leong & Co) for the petitioner.
Mahathir bin Abdullah (Zainudin Wan Nadzim, Chua & Mazlinda) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The parties will be referred to like what they were referred to at the High Court. Thus, Israq Holding Sdn Bhd (382287–H) will be referred to as the petitioner while Gulf Business Construction (M) Sdn Bhd (307134–P) will be referred to as the respondent.

A THE FACTS AND THE ANALYSIS THERETO

[2] On 3 June 2005, the petitioner as the plaintiff in the Originating Summons No D2–24–123 of 2005 obtained an order against the respondent who was the second defendant in that originating summons and against Tetuan Par Govind & Co who was the first defendant in that originating summons directing them to jointly and severally release and refund to the petitioner the trust money of RM504,000 together with the interest accrued thereto, if any. That court order can be seen at pp 46–48 of the appeal record at *Jilid* 2.

[3] The court order dated 3 June 2005 has not been set aside nor varied. It remains as a court order and it is contempt to disobey an order of the court. It is no answer to an action for contempt to argue that the court order should not have been made. The correct course to take would be to challenge the court order by applying to have it set aside. In *Hadkinson v Hadkinson* [1952] P 285 at p 288 (CA), Romer LJ put it nicely in these salient words:

> It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.

[4] In the same vein, Lord Donaldson of Lymington MR said in *Johnson v Walton* (1990) 1 FLR 350 at p 352 (CA) that:

> It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted or accepted in the first place.

[5] Now, even if the court order was not made jointly and severally against both the respondent and Tetuan Par Govind & Co, yet either one of them would still have to bear the whole of that liability all by itself up to the limit of the judgment on the strength of the authority of the case of *Dynasty Rangers Sdn Bhd & Anor v Perak Meat Industries Sdn Bhd* [2002] 5 MLJ 291.

[6] Premised upon the court order, a notice under s 218(1)(e) of the Companies Act 1965 dated 28 March 2006 was issued and served on the respondent's company secretary on 30 March 2006. Of course, the inability to pay the debts is the most commonly relied ground for winding up a company. An inability to pay is proved by service of the statutory notice under s 218(2) of the Companies Act 1965 or by other proof of insolvency.

According to the case of *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95, prima facie a creditor, like the petitioner here, who has not been paid has the right to file a petition for winding up whatever its other motives may be.

[7] The test to ascertain commercial insolvency is rather simple. It is this. That the company is unable to meet the current debts as they fall due. And such a company may still be categorised as 'unable to pay its debts' even though the company has substantial wealth which cannot be realised immediately and even though on liquidation the company will be able to meet all its liabilities (*Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v Official Receiver And Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57 (CA); *Wei Giap Construction Co (Pte) Ltd v Intraco Ltd* [1979] 2 MLJ 4; *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 (PC); *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21; *MBF Finance Bhd v Sri-Hartamas Dvpt Sdn Bhd* [1992] 3 CLJ Rep 55 at p 59; *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 at p 454 (SC); *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21 at p 29 and *Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd* [1998] 3 MLJ 810 at p 814).

[8] The 21 days (three weeks) period had lapsed, and the respondent failed to pay the sum as demanded or any part thereof. The petitioner had no choice but to file the winding up petition. Section 218(2)(a) of the Companies Act 1965 enacts as follows:

> Definition of inability to pay debts
>
> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

[9] The demand that is required under s 218(2)(a) of the Companies Act 1965 can be in any form. There is no prescribed form to follow. So long as there is a notice of demand that is sufficient. The purpose of the notice is to warn the debtor, like the respondent here, of an impending petition (*Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 at p 317 (SC)). And the notice that is issued to the debtor must relate to a specified debt and that debt cannot be seriously questioned (*Re A Company*

A [1985] BCLC 37). That debt too must be in a liquidated sum (*Ng Ah Kway v Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58). It must be emphasised that the debt must be presently due and owing (*Re Bryant Investment Co Ltd* [1974] 2 All ER 683). And the debtor has 21 clear days (three weeks) to pay and that would exclude the day of service (*Re Lympne Investments Ltd* [1972] B 2 All ER 385). A note of warning must be sounded. That a statutory notice under sub-s (2)(a) of s 218 of the Companies Act 1965 cannot be construed to be prima facie evidence of the debt (*Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd* [2000] 6 CLJ 290).

C **[10]** The failure of the debtor to pay the debt within 21 days (three weeks) after the service of the notice of demand entitles the creditor to present a petition and that petition cannot be restrained by an injunction. And it is not open to the debtor to say that it is able to pay the debt but chooses not to (*Cornhill Insurance plc v Improvement Services Ltd and others* [1986] 1 WLR D 114).

[11] The failure on the part of the company to pay as demanded would trigger the presumption that the company is unable to pay its debt. This presumption is, however, rebuttable. The onus shifts onto the company to E show that it is able to pay the debt (*PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd*). Thus, the inability to pay on the part of the company gives the requisite jurisdiction of the court to make a winding up order against the company (*Securicor (M) Sdn Bhd v Universal Cars Sdn Bhd* [1985] 1 MLJ 84).

F

[12] The solicitors for the petitioner issued the statutory notice to the respondent by way of a letter dated 28 March 2006 as seen at p 49 of the appeal record at *Jilid* 2. That statutory notice was worded in this way:

G Notice under Section 218 of the Companies Act, 1965

> We act for Israq Holding Sdn Bhd and are instructed to demand from your goodselves the sum of RM504,000.00, being the amount due and owing from your goodselves pursuant to an order obtained against your goodselves dated H 03.06.2005 in respect of Kuala Lumpur High Court Originating Summons No D2–24–123–2005, the particulars of which are well within the knowledge of your goodselves.
>
> 2. TAKE NOTICE that your goodselves shall be deemed to be unable to pay your debts if your goodselves were to neglect to pay or to secure or to compound I to the reasonable satisfaction of our clients within three (3) weeks from the date of service of this notice the said sum of RM504,000.00 and winding-up petition will be filed in court against your goodselves accordingly.
>
> 3. TAKE FURTHER NOTICE that our client reserves their rights to pursue the element of cost and interest at other appropriate forum.

[13] That statutory notice was a good notice in the context of s 218(2)(a) of the Companies Act 1965.

[14] Now, a day prior to the scheduled hearing of the petition which was on 2 November 2006, the respondent had on 1 November 2006 purported to file and serve an affidavit in opposition to the petition ('impugned affidavit'). And during the hearing of the petition on 2 November 2006 before the High Court judge, the petitioner had raised an objection as to the admissibility of the impugned affidavit on the ground of non-compliance with r 30(1) of the Companies (Winding-Up) Rules 1972. Without the benefit of the written grounds of judgment of the High Court judge, we are constrained to hear afresh and we have, as demonstrated, able to do so with ease. Be that as it may, r 30(1) of the Companies (Winding-Up) Rules 1972 states as follows:

> 30 Affidavits opposing the petition and affidavits in reply
>
> (1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

[15] The impugned affidavit should be filed and a copy thereof served on the petitioner or the petitioner's solicitor at least seven days before the hearing date of the petition. This was not done. We were told that the objection was upheld by the High Court judge and rightly so. The mandatory nature of r 30(1) of the Companies (Winding-Up) Rules 1972 was highlighted by Siti Norma Yaakob JCA (later Chief Judge Malaya) in *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 (CA).

[16] The 'literal' rule or the 'plain meaning' rule as is known in America is best illustrated by referring to the speech of Tindal CJ in *The Sussex Peerage* (1844) 11 Cl & Fin 85 at p 143. There His Lordship said this:

> ... the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

[17] In our judgment, the clear and unambiguous words employed in r 30(1) of the Companies (Winding-Up) Rules 1972 must be given effect and, accordingly, the impugned affidavit cannot be relied upon in opposing the petition to wind up the respondent.

[18] It was only on 16 November 2006 that the High Court judge ordered the respondent to be wound up.

[19] It must be emphasised that there was no appeal against the court order dated 3 June 2005. And for all intents and purposes that court order must be construed as final, conclusive and binding.

[20] It is legally impossible for the respondent to challenge the validity of the court order dated 3 June 2005 in the winding up proceedings. If high authority is required for this simple proposition, the case of *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 (SC), a decision of Lee Hun Hoe CJ (Borneo) should be referred to. There at p 305, His Lordship had this to say:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *In re Easton* (1893) 10 Mor 111; 9 TLR 409. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings.

[21] In the same vein, Steve Shim J (later Chief Judge, Sabah and Sarawak) in *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 6 MLJ 155, had this to say at p 158 of the report:

> It is trite law that an order, even if irregular, is valid and enforceable until set aside. This principle is particularly relevant in bankruptcy proceedings where the court generally will not look behind the judgments or order save in very limited circumstances of fraud or illegality etc.

[22] In our judgment, the respondent was insolvent. It was unable to repay the trust money in the sum of RM504,000 in compliance with the court order dated 3 June 2005. In the circumstances, it was just and equitable for the respondent to be wound up within the ambit of s 218(1)(i) of the Companies Act 1965.

[23] What is just and equitable would vary from case to case. Thus, a company may be wound up where it is just and equitable that the company should be wound up. So many reasons can be advanced to wind up a company under the just and equitable principle, and the following illustrations would suffice:

(a) where the substratum of the company has gone (*Galbraith v Merito Shipping Co Ltd* 1947 SC 446; *Re Kitson & Co Ltd* [1946] 1 All ER 435

(CA); *Re Mediavision Ltd* [1993] 2 HKC 629; *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 and *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314);

(b) where the company's main object for its existence has lapsed (*In re Haven Gold Mining Company* (1881–82) 20 Ch D 151 (CA); *In re German Date Coffee Company* (1881–82) 20 Ch D 169 (CA); *In re Red Rock Gold Mining Co Ltd* (1889) 61 LT 785; *Re Coolgardie Consolidated Gold Mines Ltd* (1897) 76 LT 269 (CA); *In re Palace Restaurants, Limited* [1914] 1 Ch 492 (CA) and *Re Baku Consolidated Oilfields Ltd* [1944] 1 All ER 24);

(c) where the principal object of setting up the company can no longer be achieved (*Re Perfectair Holdings Ltd* [1990] BCLC 423);

(d) where the company's only business is ultra vires the company (*In re Crown Bank* (1890) 44 Ch D 634);

(e) where the company is carrying on its business at a loss and the remaining assets of the company are insufficient to pay its debts (*In re Wey and Arun Junction Canal Company* (1867) 4 LR Eq 197; *In re Diamond Fuel Company* (1879)13 Ch D 400 (CA) and *Re Great Northern Copper Mining Co of South Australia Ltd; Ex p The Co* (1869) 20 LT 347);

(f) where there is no reasonable hope of ultimate profit for the company (*Davis & Co Ltd v Brunswick (Australia) Ltd; Brunswicke-Balke-Collender Co and Brunswick Radio Corporation* [1936] 1 All ER 299 at p 309 (PC));

(g) where the relationship of the parties in the company has broken down irretrievably (*Re Chynchen Associates Ltd* [1987] 1 HKC 311);

(h) where there is a lack of confidence among the shareholders that threaten the very existence of the company (*Re San Imperial Corp Ltd (No 2)* [1980] 1 HKC 463); and

(i) where the winding up of the company would open the door to investigate the misconduct of the directors or promoters of the company (*In re General Phosphate Corporation; In re Northern Transvaal Gold Mining Company; In re Delhi Steamship Company* [1895] 1 Ch 3; *In re Bleriot Manufacturing Aircraft Company (Limited)* (1916) 32 TLR 253; *In re The Newbridge Sanitary Steam Laundry Ltd* (1917) 1 IR 67 and *In re The Varieties Limited* [1893] 2 Ch 235).

[24] The list is endless. It is not exhaustive.

[25] Be that as it may, the winding up of the respondent was supported by the supporting creditor who was the only party that gave the notice of intention to appear.

[26] This was a watertight case for the petitioner. Nothing turned in favour of the respondent.

CONCLUSION

[27] For the reasons adumbrated above, we unanimously dismissed the appeal of the respondent with costs to be borne personally by Syed Mustafa bin Syed Ibrahim Al-Tahir bearing NRIC No 610130–66–5069. Deposit to the petitioner to account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon